NO. 34710-9-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

ALEXANDER JOHNSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable Michael P. Price, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. JUROR 2 EXPRESSED ACTUAL BIAS WHEN SHE DECLARED HER "FAITH" THAT THE PROSECUTOR WAS "GIVING US THE TRUTH."

Juror 2's actual bias deprived Johnson of his right to trial by an impartial jury. Juror 2 clearly expressed preconceived ideas about the truth and reliability of the State's witnesses and evidence. Talking directly to the prosecutor, she stated, "I have faith that you are giving us the truth and that the evidence you're giving us is reliable." RP 124. She was never asked whether she could set aside this preconceived belief in the truth of the State's evidence. However, the State now claims her next utterance, "that the evidence that this party would give is reliable, so I would say if evidence is presented in court, I would believe it," indicated impartiality. Brief of Respondent (BoR) at 10; RP 124. This argument should be rejected for two main reasons.

First, the State claims, without any factual basis, that when Juror 2 said "this party" she was referring to the defense. BoR at 10. This is pure speculation, insufficient to resolve doubts about the juror's ability to be impartial.

Second, even if the juror meant to say she would also believe all evidence put forth by the defense, this does not rehabilitate her ability to be impartial because the defense has no burden to put on any evidence. A

declaration that she will believe all evidence presented in court still amounts to a declaration that she has pre-judged as truthful and reliable all of the State's witnesses. At best, her comments show an inability to understand or perform the juror's role of judging for herself the credibility and truthfulness of witnesses.

The State's argument here parallels the one made in State v. Irby, 187 Wn. App. 183, 197, 347 P.3d 1103 (2015), rev. denied, 184 Wn.2d 1036 (2016), where the State argued there may have been something in the juror's tone or demeanor that outweighed the literal meaning of the words "I would like to say he's guilty." As discussed in the opening brief, the court rejected this argument. See Brief of Appellant at 15-16; Irby, 187 Wn. App. at 197. Here, the State asks for similar speculation that the juror meant to say she would gauge the credibility of all evidence presented, even though what she said was "I have faith that you are giving us the truth and that the evidence you're giving us is reliable, that the evidence that this party would give is reliable, so I would say if evidence is presented in court, I would believe it." RP 124.

Juror 2 offered an unambiguous statement of bias, followed by an ambiguous statement. RP 124. There was no rehabilitation. The seating of a juror who expressed actual bias was manifest constitutional error that requires reversal of Johnson's conviction. Irby, 187 Wn. App. at 188.

2. THE COURT FAILED TO FOLLOW THE THREE-STEP PROCESS TO FIND WAIVER OF JOHNSON'S RIGHT TO BE PRESENT AT HIS TRIAL.

Before a court can find a voluntary waiver of the accused person's right to be present at trial, Washington law mandates a three-step process: (1) an initial inquiry into the totality of the circumstances, (2) a preliminary determination on the question of voluntariness, and (3) if the person returns, an "adequate opportunity to explain his absence." State v. Garza, 150 Wn.2d 360, 367-68, 77 P.3d 347 (2003). The court's omission of the third step requires reversal in this case. The defendant's right to allocution is not a substitute for this third step, and the State cannot show the error did not contribute to the verdict.

a. Allocution at sentencing is not an adequate opportunity to explain a trial absence or show a voluntary waiver of the right to be present.

The court never asked Johnson to explain his absence after he returned to court. The court instead asked pointed questions regarding Johnson's decision to remain in the courtroom moving forward. RP 443-47. Yet the State claims Johnson was given adequate opportunity to explain his absence and rebut the preliminary finding of voluntary waiver because he was afforded his right to allocution at sentencing. BoR at 23. This argument should be rejected because the accused person's opportunity to be heard is a

critical part of protecting the constitutional right to be present and the State's argument would eliminate this critical protection.

Allocution is specific to sentencing and has no bearing on the existence of a voluntary waiver of the right to be present at trial. The right to allocution before sentencing is derived from the common law and the Federal Rules of Criminal Procedure. In re Pers. Restraint of Echevarria, 141 Wn.2d 323, 332-33, 6 P.3d 573 (2000). Federal criminal rule 32(4)(A) affords the defendant the opportunity to "speak or present any information to mitigate the sentence." Similarly, the Sentencing Reform Act requires courts to consider arguments from the offender at sentencing "as to the sentence to be imposed." RCW 9.94A.500(1).

By offering Johnson allocution, the court was offering to hear his arguments about the sentence, not his explanation of why he was absent from most of trial. RP 585. The court specifically informed Johnson he had the right to make a statement called "allocution." RP 585. Nothing about the context of this discussion in any way indicated the judge was offering Johnson an opportunity to explain his absence during the trial or revisit the waiver decision. The court merely afforded Johnson his right to allocution, his right to be heard on the issue of his sentencing, as required by statute.

In mandating that an absent defendant who returns be afforded the opportunity to explain his absence, the courts are referring to something

more than the right to allocution. Otherwise, there would be no need to require that the opportunity to explain be provided. The right to allocution is a statutory right offered to every defendant at sentencing by law. RCW 9.94A.500. If this were sufficient, there would be no reason for courts to mandate that the defendant be provided adequate opportunity to explain his absence because that opportunity would already exist at sentencing.

The three-step voluntary waiver analysis mandated in Washington arises from the need to carefully protect the constitutional right to be present at trial. State v. Thomson, 123 Wn.2d 877, 880-81, 872 P.2d 1097 (1994). The three-step process is used to determine whether there has, in fact, been a voluntary waiver of that right, and the court must "indulge a presumption against a waiver." Id. at 881. The Thomson court held that the three-step process "amply protects" the right to be present. Id. at 883. This Court should reject the State's attempt to eliminate one third of the process.

The court was required to afford Johnson an "adequate opportunity" to explain his absence and rebut the finding that it was voluntary. Id. at 881, 883. An adequate opportunity must be a meaningful one. It must be clear or evident what is being offered. The State has cited no authority for its argument that the mere offer of the right to allocution at sentencing should suffice.

b. The Court's failure to follow the mandated procedure for finding a voluntary waiver was not harmless beyond a reasonable doubt.

The State claims the court's failure to protect Johnson's right to be present by offering him the opportunity to explain his absence was harmless. But the State cannot meet its burden to show to show harmlessness beyond a reasonable doubt. The subsequent bail jumping prosecution does not mitigate the harm or relieve the court of its duty to offer Johnson the chance to explain. And the State cannot show that Johnson's absence during much of the trial did not contribute to the verdict.

Assuming, for the sake of argument, that this Court deems it appropriate to consider Johnson's subsequent plea to bail jumping,[1] that plea does not mitigate the harm from the court's failure to properly protect Johnson's right to be present. A conviction, or even a guilty plea on a charge of bail jumping is not inconsistent with an involuntary absence. Indeed, this Court has affirmed a conviction for bail jumping even though the defendant was incarcerated (and, therefore, not voluntarily absent) at the time. State v. O'Brien, 164 Wn. App. 924, 931-32, 267 P.3d 422 (2011). This Court should reject the State's attempt to conflate the voluntary waiver of the right to presence with the criminal offense of bail jumping.

[1] The State has moved to supplement the record with the information, affidavit of probable cause, guilty plea, and judgment and sentence for a subsequent bail jumping prosecution arising out of the events in this case. Johnson has moved the court to modify the Commissioner's ruling granting the State's motion to supplement.

A person is guilty of bail jumping if that person is knowingly absent when required by court order to be present. RCW 9A.76.170. The reason for the absence is largely beside the point. Id. The reason matters only if the defendant has evidence and can prove, as an affirmative defense, both that uncontrollable circumstances prevented his presence and that, as soon as those circumstances ceased to exist, he appeared as required. Id.

By contrast, in this case, the question is voluntary waiver of the right to be present. The court can find a waiver only if the reason for the absence is defendant's voluntary choice. Garza, 150 Wn.2d at 367. Unlike in the bail jumping context, in the waiver context, the State bears the burden to prove the defendant's absence was voluntary. Id. At 368. Given these very different burdens of proof, a person may well opt to plead guilty to bail jumping even though the absence was involuntary.

For example, a person may have been prevented from appearing due to uncontrollable circumstances but may not have evidence likely to persuade a jury of that fact. Similarly, even if he can prove he was unavoidably detained, he may not have returned as soon as it became possible, or may not be able to prove that he did so. The inability to defend against a bail jumping charge is not the same as a voluntary waiver of the right to be present.

A guilty plea on a bail jumping charge is not necessarily tantamount to an admission that the absence was voluntary. When a defendant wants to take advantage of an advantageous plea bargain, the laws permits guilty pleas, without an express admission of guilt or even without a factual basis. State v. Zhao, 157 Wn.2d 188, 200, 137 P.3d 835 (2006); State v. Newton, 87 Wn.2d 363, 371, 552 P.2d 682 (1976). Specifically, Johnson's plea documents do not show a voluntary waiver of his right to be present. In Johnson's statement, he admitted he failed to return to trial. CP 164. He said nothing about the reason for that absence or whether it was voluntary.

The court failed to afford Johnson the required opportunity to explain his absence. A criminal proceeding for bail jumping, at which the State bears the burden of proof on elements that do not match up with the voluntary waiver inquiry, does not subsequently provide that opportunity. The State bears the burden to show this error was harmless beyond a reasonable doubt. Irby, 170 Wn.2d at 885-87. Johnson's guilty plea to bail jumping does not show voluntary waiver beyond a reasonable doubt.

The State also appears to argue Johnson would not have given an explanation even if he had been given the chance to do so. BoR at 14, 23. Essentially, the State speculates that, if he had been offered the chance to explain, Johnson would have exercised his right to silence under the Fifth Amendment because of the pending prosecution. But when Johnson returned

from his absence, there was no pending prosecution. Johnson's trial in this case took place in June of 2016. Johnson returned to the trial on June 23, 2016. RP 443-47. The information charging him with bail jumping was not filed until August 8, 2016. CP 139. The potential that criminal charges for bail jumping might be filed sometime in the future does not excuse the court's failure to offer Johnson the opportunity to explain his absence at the time of his return.

The State also argues the error was harmless because Johnson returned and was present before the end of the State's evidence and had the opportunity then to testify or present witnesses. BoR at 25-26. This argument must also be rejected. First, the right to be present is not limited to the right to testify or present witnesses; it is grounded in the right to confront the State's witnesses face to face. United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985). The right to confrontation requires the opportunity for cross examination. Crawford v. Washington, 541 U.S. 36, 61, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

Thus, to show that this error did not contribute to the verdict, the State would need to show, beyond a reasonable doubt, that Johnson would have had no helpful input during his attorney's cross-examination of the State's witnesses, no insight based on observing their testimony that would have been persuasive if mentioned during closing argument. It is impossible

to know what contributions were lost because Johnson was not there to hear most of the evidence against him.

The State cannot prove beyond a reasonable doubt that Johnson's absence would have been found voluntary if he had been given the chance to explain. Nor can it show that his absence did not contribute to the verdict. The court's failure to offer Johnson an opportunity to explain his absence requires reversal of his convictions.

3. THERE WAS NO LEGITIMATE TACTICAL REASON TO ALLOW THE STATE TO PRESENT INADMISSIBLE BUT SEEMINGLY AUTHORITATIVE EVIDENCE THAT THE PELLET GUN WAS A DEADLY WEAPON.

In its response, the State has not even attempted to argue that the manufacturer's warning for the pellet gun was admissible evidence in this case. Instead, it argues trial counsel was not ineffective for failing to object or move to exclude it, claiming this must have been a strategic decision by defense counsel. BoR at 27-28. Failing to challenge evidence that is clearly inadmissible and that purports to establish an essential element of the State's case is not a legitimate defense strategy.

The manufacturer's warning informed the jury that the pellet gun was capable of causing "serious injury or death." RP 397. That was the only evidence clearly pointing to that capacity. Otherwise, the gun was shown capable of damaging a window or causing a bruise. RP 302-03, 315-17. The

State bore the burden to prove beyond a reasonable doubt that the pellet gun, as used in this case, was a deadly weapon. RCW 9A.36.021 (elements of second degree assault); RCW 9A.04.110(6) (definition of deadly weapon). The effectiveness of the manufacturer's warning in making the State's case on this disputed element is shown by the prosecutor's closing argument, in which he read the warning to the jury again and declared, "That right there makes that pellet gun a deadly weapon." RP 545.

The State argues, however, that the defense somehow wanted this evidence before the jury so that counsel could then attempt to undercut its effectiveness. BoR at 28-29. This argument misses the point. If the evidence had been excluded, as required by the rules of evidence, counsel would not have needed to try to undercut it with argument. The fact that he did so indicates counsel failed to realize the warning was inadmissible.

Without the manufacturer's warning, the jury would have been speculating as to whether the pellet gun was truly capable of causing death or substantial bodily harm. With it, the jury could point to an apparently definitive and authoritative determination of that issue by the manufacturer. The failure to object to this inadmissible hearsay was ineffective, and Johnson's conviction for second degree assault should be reversed.

4. IMPROPER OPINIONS ON GUILT, AND DEFENSE COUNSEL'S FAILURE TO OBJECT, REQUIRE REVERSAL OF JOHNSON'S CONVICTIONS.

The State argues its witnesses were justified in offering opinions on guilt merely because they were well acquainted with Johnson. BoR at 37-38. This argument should be rejected. Opinions that Johnson was the shooter are not based on witness perception when the witnesses did not see the shooter and thus had no basis for comparison. Counsel was ineffective in failing to object when these were not mere passing mentions that a jury might ignore.

Melanie Kurtzhall offered an improper opinion on guilt when she told the jury, "I knew that he had taken this, whatever, pellet gun or whatever it was and shot Eric with it." RP 268. This "knowledge" was not based on any personal observation. She was not present at the time of the shooting. She saw no part of the shooting, heard no part of the shooting, and perceived nothing relevant at the time of the shooting. The State has made no argument to the contrary. Instead it argues her opinion that Johnson was the shooter was based on her "considerable familiarity" with Johnson. BoR at 37-38. Knowing what Johnson looks like is not a basis for Kurtzhall to opine that he was the shooter when she was not there and did not witness the shooting.

Unlike Kurtzhall, Leggett was present when he was shot. However, he did not see the shooter. RP 363. His opinion was based on notes Johnson had sent him and the location of Johnson's wife's apartment. RP 356. Both

the notes and the layout of the neighborhood were in evidence for the jury. Leggett was not in any better position than the jury to determine the direction of the shots. And even if he were, he was not in any better position to say who might have been the shooter. Leggett did not merely opine that the shots seemed to come from Johnson's wife's apartment or that Johnson was a likely suspect due to the notes he had left. He offered an opinion that Johnson was responsible for his injuries. RP 356. This invaded the province of the jury.

A witness opinion identifying a person may be appropriate "as long as there is some basis for concluding that the witness is more likely to correctly identify" the person than is the jury. State v. George, 150 Wn. App. 110, 118, 206 P.3d 697 (2009). At issue in George was the police officer's testimony identifying the defendant in a surveillance video. But the same principle applies here. The court explained that opinion testimony identifying the defendant in the video "runs 'the risk of invading the province of the jury and unfairly prejudicing [the defendant].'" Id. (quoting United States v. LaPierre, 998 F.2d 1460, 1465 (9th Cir. 1993)). The court held that the trial court abused its discretion in allowing the officer to identify the defendants in the video because they did not have "extensive contacts" and their limited contacts "do not support a finding that the officer knew enough about George and Wahsise to express an opinion that they

were the robbers shown on the very poor quality video." George, 150 Wn. App. at 119. In short, the officer was in no better position than the jury to decide if the video showed the defendants or not.

That is also the case here. Leggett was in no better position than the jury to determine who was the shooter. The jury had access to the same information about the locations of the apartments and the notes. Since Leggett did not observe the shooter, his familiarity with Johnson's appearance and mannerisms is beside the point. That was not the basis for his opinion.

The lack of personal observation of the shooter distinguishes this case from State v. Hardy, 76 Wn. App. 188, 884 P.2d 8 (1994), and State v. Blake, 172 Wn. App. 515, 298 P.3d 769 (2012), relied on by the State in its response. See BoR at 35-39. In Hardy, the officer, who had known Hardy for six or seven years, was permitted to offer an opinion that it was the defendant he could see in the surveillance videos of drug transactions based on the officer's prior extensive contacts with the defendant. 76 Wn. App. At 191. Based on his thorough prior experience, the officer was in a better position than the jury to compare the defendant's appearance to the person seen in the videos of the drug transactions at issue. Id. at 192. Here, however, Leggett was not in a better position to compare Johnson's appearance to that of the shooter because he did not see the shooter. RP 363.

Blake is also inapposite because, in that case, the victim testified Blake was standing next to him and he felt the shot come from that direction. 172 Wn. App. At 524. The victim's prior personal knowledge (based on observation) of Blake's location was a rational basis for the opinion that the defendant was the shooter. But here, no such observation could support Leggett's opinion. He did not claim to have any knowledge of where Johnson was at the time of the shooting. He only knew what the jury knew – the existence of the notes and the locations of the apartments. RP 356. Leggett's opinion that Johnson was responsible for his injuries was not based on any factual observation. RP 356. Leggett was in no better position to determine the shooter's identity than the jury.

Leggett's and Kurtzhall's nearly explicit opinions on guilt were manifest constitutional errors that require reversal of Johnson's conviction. Alternatively, it was ineffective assistance for defense counsel not to object.

The State claims counsel may have had a strategic reason for not wanting to emphasize the opinions. BoR at 40. This argument should be rejected because Leggett's opinion was already emphasized by the prosecutor's extensive questioning. RP 356. The prosecutor first asked Leggett if he had an opinion, signaling to the jury what was coming. RP 356. Then he asked who, in Leggett's opinion, was responsible for his injuries. RP 356. Leggett said, "Alex Johnson." RP 356. The prosecutor then clarified

this was the same person who left the notes, and asked if that was why Leggett believed Johnson to be responsible. RP 356. Leggett explained it was both the notes and the location of the apartment. RP 356.

This was not a brief, passing mention that counsel might hope the jury would just ignore. It was a series of questions designed to highlight, explain, and support Leggett's opinion. This emphasis also shows why these opinions caused actual prejudice and thus were manifest constitutional error. Improper opinion testimony, or alternatively, ineffective assistance of counsel in failing to object requires reversal of Johnson's convictions.

5. THE "UNAUTHORIZED" NATURE OF JOHNSON'S TENANCY WAS INADMISSIBLE, AND COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT.

As defense counsel recognized during the trial, whether Johnson was permitted to reside at his wife's apartment was not relevant. RP 252. The fact that Johnson essentially lived there, or was frequently found there was certainly relevant. But the details of his status as an "unauthorized guest" were not. RP 252. Yet the prosecutor began by emphasizing this aspect of Johnson's tenancy, asking if it was suggested to Kurtzhall that Johnson was "not permitted to be at the Cornerstone." RP 252. Not only was he not permitted to be there, but "We had addressed that issue a few times." RP 252. This testimony presented Johnson as someone who repeatedly disregarded the rules.

Johnson's disregard of the rules regarding his tenancy did not make it more or less likely that he shot Leggett or committed any charged offense. It does, however, make him appear to be someone who breaks the rules in general. That raises a classic propensity inference in the eyes of the jury. Counsel was ineffective in failing to raise an objection under ER 404(b), which prohibits the use of "other acts" for purposes of showing action in conformity therewith. The failure to object is an additional instance of ineffective assistance of counsel that requires reversal.

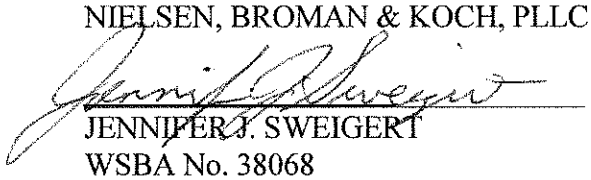
B. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, Johnson requests this Court reverse his convictions.

DATED this 12th day of September, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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